Supreme Court, U.S.
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No. _____

IN THE

Supreme Court of the United States

October Term, 1994

ANTHONY COMPARATO, Individually and as the Administrator of the estate of John Comparato, MILDRED COMPARATO, MILLICENT COMPARATO, DIANA COMPARATO CARLUCCI,

Petitioners,

V.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

ANTHONY COMPARATO
Individually, and as the Administrator of the estate of John Comparato,
MILDRED COMPARATO,
MILLICENT COMPARATO,
DIANA COMPARATO CARLUCCI,
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July 12, 1994

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QUESTION PRESENTED

I. Did the Court of Appeals err in upholding the decision of the trial Court finding and concluding (1) (a) that an interest in wrongful death proceeds as statutory distributees and (b) that damages for pain and suffering in an estate were vested property interests to which a federal tax lien attached and (2) (a) that a renunciation of any interest in an estate consisting of assets received for pain and suffering and (b) that a renunciation of an interest as statutory distributees in damages for wrongful death did not defeat a federal tax lien?

LIST OF PARTIES

The parties to the proceedings are the petitioner and the respondent. In the trial court additional parties to the proceeding were Baron and Vesel, P.C. and James J. Collins, Clerk of the Surrogate's Court of New York, Queens County.

The petitioners were represented in the trial court by Frederick P. Sostek, 58-26 Roosevelt Ave., Woodside, NY and in the court of appeals by Richard F. Thurston, 3224 Perry Street, Denver, Colorado 80212 ((303) 458-8192).

The respondent was represented at trial by Deborah S. Meland, Trial Attorney Tax Division, U.S. Department of Justice and Andrew J. Maloney, United States Attorney, Brooklyn, NY and on appeal by Sara S. Holderness, Gary R.

Allen and Gilbert S. Rothenberg, Attorneys, Department of Justice; Loretta C. Argett, Assistant Attorney General; and Zachery W. Carter, United States Attorney, Brooklyn, N.Y.

Additional party, Baron and Vesel, P.C. was represented by David A. Vesel, 80-02 Kew Gardens Road, Kew Gardens, NY. Additional party James J. Collins, Clerk of the Surrogate's Court of New York, Queens County was represented by Michael Colodner, Office of Court Administration, 270 Broadway, Room 1400, New York, NY.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
LIST OF PARTIES	ii
TABLE OF AUTHORITIES	v
OPINIONS BELOW	1
JURISDICTION	2
STATUTE INVOLVED	3
STATEMENT OF THE CASE	3
REASONS FOR GRANTING THE WRIT	12
I. The decision of the Second Circuit is conflict with the Ninth Circuit.	
CONCLUSION	24
APPENDIX	a1
Second Circuit Opinion	a1
District Court Opinion	a17

TABLE OF AUTHORITIES

CASES

	Page
Aquilino v. United States, 363 U.S. 509, 513 (1960)	13
Estate of Summrall, 402 N.Y.S 2d 770 (Sur. Ct. 1978)	18
Estate of Schiffman, 105 Misc. 2d 1029, 430 N.Y.S. 2d 229 (Sur. Ct. 1980)	19
George v. Mt. Sinai Hosp. 390 N.E. 1156 (1979)	14
Glass City Bank of Jeanette, Pa. v. United States, 326 U.S. 265 (1945)	13
In re Wilson's Estate, 298 N.Y. 398, 83 N.E.2d 852 (1949)	20
Mapes v. United States _____ F.2d. _____ (1994)	12, 23
Matter of Estate of Dominguez, 143 Misc.2d 1010, 541 N.Y.S. 2d 934, (Sur. Ct. 1989)	16, 18
United States v. McDermott, 113 S. Ct. 1526, 1527 (1993)	13
United States v. Mitchell, 403 U.S. 190 (1971)	21, 23

United States v. National Bank of Commerce, 472 U.S. 713, 720 (1985) 12, 13

STATUTES, REGULATIONS AND RULES:

26 U.S.C. Section 6321 12, 14

26 U.S.C. Section 6322 13

28 U.S.C. Section 1254(1) 2

28 U.S.C. 1342 2

28 U.S.C. 1291 2

New York Estates, Powers and Trust Law

Section 2-1.11 17

Section 2-1.11(b)(2) 10 15

Section 2-1.11(d) 16

Section 4-1.1(a)(4) 14

IN THE SUPREME COURT
OF THE UNITED STATES

October Term 1994

ANTHONY COMPARATO, Individually, and as the Administrator of the estate of John Comparato, MILDRED COMPARATO, MILLICENT COMPARATO, DIANA COMPARATO CARLUCCI,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The petitioners, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit entered in the above entitled proceeding April 18, 1994.

OPINIONS BELOW

The opinion of the Court of Appeals

for the Second Circuit is reported at ___ F.2d. ____ (2nd Cir. 1994), and is reprinted in the appendix hereto, p. a1.

The decision of the United States District Court for the Eastern District of New York on this issue has not been reported. The decision are set forth in the appendix hereto, p. a 17.

JURISDICTION

Jurisdiction of the United States District Court for the Eastern District of New York to try the case is 28 U.S.C. 1342.

On petitioners appeal to the United States Court of Appeals, the Court denied the appeal on the issue on April 18, 1994. The jurisdiction of the Court of Appeals to hear the case was invoked under 28 U.S.C. 1291.

The jurisdiction of this Court to review the judgment of the Second

Circuit is invoked under 28 U.S.C. Section 1254(1).

STATUTE INVOLVED

Internal Revenue Code of 1986 (26 U.S.C.):

Section 6321. LIEN FOR TAXES.

If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount (including any interest, additional amount, addition to tax, or assessable penalty, together with any costs that may accrue in addition thereto) shall be a lien in favor or the United States upon all property and rights to property, whether real or personal, belonging to such person.

STATEMENT OF THE CASE

This action was filed on July 15, 1992, by the United States of America to foreclose certain tax liens against the

defendants Anthony and Mildred Comparato to reduce them to judgment and additionally to determine that certain renunciations of any interest in the estate of John Comparato by their parents, Anthony and Mildred Comparato were fraudulent conveyances. Jurisdiction of the United States District Court for the Eastern District of New York to try the case is 28 U.S.C. 1342.

The appellants filed answers denying that relief was warranted. The defendant Baron and Vesel, P.C. filed an answer admitting that it held certain monies in escrow and denying the other allegations of the complaint of the United States and requested dismissal of the complaint. The Clerk of the Surrogate's Court of New York, Queens County filed an answer admitting that

certain monies were placed in escrow pursuant to Court orders and denied other allegations and took no position as to the controversy.

The assets of the estate of John Comparato consisted of monies as a result of a malpractice settlement. The trial court granted summary judgment and later final judgment finding in effect that Anthony and Mildred Comparato had property interests in both damages for wrongful death and damages for pain and suffering to which the federal tax lien attached, without regard to a renunciation by Anthony and Mildred Comparato to any interest in the estate of John Comparato. Millicent Comparato and Diana Comparato Carlucci are daughters of Anthony and Mildred Comparato and sisters of John Comparato. Baron and Vessel, P. C. are attorneys

holding funds of the malpractice settlement in escrow. James J. Collins is the clerk of the Surrogates Court which has jurisdiction over disposition of the funds.

Appellants filed notice of appeal and an amended notice of appeal to the United States Court of Appeals for the Second Circuit. The United States of America Filed a cross appeal which the parties stipulated be dismissed. The Court of Appeals affirmed the judgment of the trial court.

The United States brought this action to reduce to judgment the tax liabilities of Anthony and Mildred Comparato, which now exceed $890,000.00 consisting of various jeopardy assessments filed against Anthony Comparato totaling $676,534.99 and of assessments filed against Mildred

Comparato totalling $215,515.22. Because the principal asset to which the United States would look to collect on the Comparatos' indebtedness is $650,000 in escrow accounts, which monies represent the settlement proceeds of malpractice actions relating to the Comparatos' deceased son, plaintiff further sought a judgment setting aside the Comparatos' attempts to renounce their interests in this property. The United States also sought to have the renunciation set aside as a fraudulent conveyance. The United States filed a motion for summary judgment. The District Court granted summary judgment in favor of the United States finding and concluding that the Comparatos had a vested interest in the proceeds of the malpractice action consisting both of settlements for pain and suffering and

wrongful death and further that the renunciations of the Comparatos were ineffective to defeat the lien.

John Comparato, the son of defendants Anthony and Mildred Comparato, was born in 1965. An extremely sick child, he suffered two strokes before the age of seven and required constant care and medical attention. On March 30, 1984, John Comparato died intestate at the age of 19.

While John Comparato was still alive, a malpractice action was brought in his name in New York State Supreme Court against various defendants to recover damages for pain and suffering. After his son's death, Anthony Comparato was appointed administrator of his estate by the Surrogate's Court in Queens County and in that capacity

pursued both the pain and suffering claim and a further action against the same defendants for wrongful death. The claim for pain and suffering was ultimately settled for $350,000; the claim for wrongful death was settled for $500,000.

Sometime in 1989, Mr. Comparato petitioned the Surrogate's Court inter alia to approve this settlement and to permit payment therefor of various expenses, including legal fees. He asked that the net proceeds be distributed equally as between himself and his wife as his son's statutory distributes.

Before the court acted on this request, however, the Internal Revenue Service, (referred to herein as the "IRS"), in August, 1989, served notices of levy on Baron & Vesel, attorneys for

the Comparato estate, and on the defendants in the malpractice actions, citing tax liens against both Anthony and Mildred Comparato. On September 8, 1989, Mr. Comparato advised that court that he and his wife were pursuing court challenges to the federal tax assessments. He asked the Surrogate to issue an order directing the payment of settlement funds into an escrow account pending final determination of the tax proceeding. On August 22, 1990, the Surrogate did issue such an order, but permitted payment of $200,000 in attorney fees, thereby leaving $650,000 to be deposited in eleven separate escrow accounts.

On April 10, 1991, Anthony and Mildred Comparato executed separate, but otherwise identical, renunciations of their interests in the estate of their

deceased son pursuant to Section 2-1.11 of the New York Estate, Powers and Trusts Law (McKinney 1981 & Supp. 1993). Because these renunciations were not filed within the nine-month statutory period, the Comparatos were obliged to seek an extension of time from the Surrogate's Court. An order to show cause why the extension should not be granted was issued on August 10, 1991 and served on, among others, the Internal Revenue Service. The IRS in the New York action, did not respond to order. On September 23, 1991, the Surrogate permitted the renunciations to be filed out of time.

On May 1, 1992, the Comparatos' remaining children, Diana and Millicent, petitioned the Surrogate's Court to intervene in the administration of their brother's estate, which application was

granted on July 21, 1992. By law, they would succeed their parents as statutory distributes of John Comparato. See N.Y. Est. Powers & Trusts Law Section 4-1.1(a)(5) (McKinney Supp. 1993).

On July 15, 1992, the United States commenced this action.

REASONS FOR GRANTING THE WRIT

The decision of the Second Circuit is in conflict with the Ninth Circuit. The Ninth Circuit reached a contrary result in Mapes v. United States, _____ F. 2d ____ (9th Cir. 1994).

Federal law provides that if a taxpayer fails to pay his due to the United States Treasury, there "shall be a lien in favor of the United States upon all rights and rights to property, whether real or personal, belonging to such person." 26 U.S.C. Sec. 6321

(1988). The statute's reach is deliberately broad and is meant " to reach every interest in property that a taxpayer might have." United States v. National Bank of Commerce, 472 U.S. 713, 720 (1985). Accordingly, a tax lien attaches as soon as the Secretary of the Treasury issues an assessment of tax liability. 26 U.S.C. Section 6322. Moreover, the lien reaches both current and after-acquired property. Glass City Bank of Jeanette, Pa. v. United States, 326 U.S. 265, 267 (1945); accord United States v. McDermott, 113 S. Ct. 1526, 1527 (1993)."

The threshold question in any case to enforce a tax lien is whether a taxpayer possesses 'property' to which such a lien could attach. The answer depends in the first instance on state law, which 'controls in determining the

nature of the legal interest which the taxpayer [has] in the property...." Aquilino v. United States, 363 U.S. 509, 513 (1960); accord United States v. National Bank of Commerce, 472 U.S. at 722.

In this case the trial court found, and the Court of Appeals affirmed, that the Comparatos did each possess vested separate property interests in these proceeds to which federal tax liens have attached pursuant to 26 U.S.C. Sec 6321.

Under New York law, the presumptive heirs of an interstate child such as John Comparato are his parents, each of whom is entitled to receive one-half of the estate's net proceeds. N.Y., Est. Powers & Trusts Law Sec. 4-1.1(a)(4) (McKinney Supp. 1993).

Under New York law, a wrongful

death action, unlike one for pain and suffering, belongs to a decedent's statutory distributees, not to his estate." George v. Mt. Sinai Hosp., 390 N.E. 1156 (1979).

On or about April 10, 1991 the Comparatos executed renunciations of all their "right , title and interest in and to any portion of the estate of John Comparato, deceased" pursuant to New York Estate and Powers and Trust Law Section 2-1.11. Subd.(b), par (2) thereof provides that any such renunciation be made "within nine month after the effective date of the disposition." The statute further provides:" the time to file and serve such renunciation may be extended, at the discretion of the Court, on a petition showing reasonable cause and on notice to such persons and in such

manner as the court may direct."

The Comparatos petitioned the Surrogate's Court, on or about July 16, 1991, for an order extending the time period within which they might file and serve their renunciations. The Surrogate's Court issued a citation in respect of that petition, directing that it be served upon both the Internal Revenue Service and the New York State Commissioner of Taxation and Finance, which service was duly effective.

The Internal Revenue did not respond to the service of the citation, and in the absence of opposition, the Surrogate's Court granted the Comparato's petition. The consequences of a renunciation are that " the filing of a renunciation, as provided in this section, has the same effect with respect to the renounced interest as

though the renouncing person had predeceased the . . . decedent." EPTL 2-1.11(d).

In the leading New York case, Matter of Estate of Dominguez, 143 Misc.2d 1010, 541 N.Y.S. 2d 934, (Sur. Ct. 1989) the Surrogate's Court upheld the application of EPTL 2-1.11 to a wrongful death recovery. In reaching its decision the Court relied on a 1980 amendment to the statute which substituted in the catch line thereof the term "property interest" for " a disposition or intestate share" and which added a number of additional property interest to the list of those which were renounceable, including a "transfer created . . . by operation of law . . ."

The court reasoned that the expansion of the kinds of interests to

which a renunciation might apply was broad enough to include the renunciation of wrongful death proceeds. That decision applies in the instant case, as the Comparatos renounced the wrongful death proceeds as well as the proceeds for pain and suffering.

As to the contrary implications of Estate of Summrall, 402 Ny.S.S 2d 770 (Sur. Ct. 1978), the language of the renunciation statute had been changed subsequent to the Summrall decision and the Court in Dominguez specifically addressed the inapplicability of the older decision. Moreover, the Surrogate's Court, Queens County, clearly accepts Dominguez as controlling since the Court accepted the renunciation of all settlement proceeds, including those for wrongful death.

Therefore, under New York law,

with the granting of the Comparato's petition to extend time and their renunciations, they were deemed to have predeceased their son John Comparato, with the consequences that John Comparato's heirs-at law and next-of kin were his sisters, Diana Comparato and Millicent Comparato. The sisters became, as of March 30, 1984, the exclusive owners of the claims in the action for wrongful death and the action for pain and suffering.

In the case of Estate of Schiffman, 105 Misc. 2d 1029, 430 N.Y.S. 2d 229 (Sur. Ct. 1980), it was determined that because of a renunciation effected by the administrator of the estate, there was no property interest to which a claim of the Commissioner of Social Services could attach. The Court stated:

"a renunciation . . . is made retroactive to the date of death of the deceased and must be treated as if no inheritance or gift were passed to or vested in the person renouncing . . The inheritance therefore must be free of any claim of creditors, assignees or trustees in bankruptcy, regardless of their position vis-a-vis one another. The petitioner's status as a preferred creditor, even if true, has no bearing therefore on the question of the validity of the renunciation."

Id. at 230 (citations omitted; emphasis supplied).

Any contrary implications of Matter of Wilson, 298 N.Y. 398 (1949), are misplaced. In Wilson the renouncer was found to have accepted his legacy by "word and conduct so that his power of renunciation had been lost to him prior

to his attempt to exercise it." Id. at 405. In the instant case, the Surrogate's Court has honored the renunciation.

As argued above, the Court erred in finding a vested interest in both the wrongful death proceeds and the pain and suffering proceeds. Pursuant to applicable New York law, the Comparatos never had a vested interest to which the tax lien could have attached.

Both the trial court and the Court appeals relied on United States v. Mitchell , 403 U.S.190 (1971), in deciding this case. Both courts misapprehended the holding in Mitchell. In Mitchell a divorced spouse, years later attempted to renounce her interest in community property income and other marital assets. The wife was attempting to defeat an assessment of income tax on

her share of the community income years after the fact with a renunciation during her divorce. Under well settled law, the wife had income equal to one-half of the husbands income. Evidently, the husband had not been filing income tax returns. The Court simply decided that a state law renunciation during a divorce years later was not valid to defeat the income tax due on her share of the community income. The case in no way relates to the issue of the effect of a valid state law renunciation of proceeds effected by death.

Under valid state law, the Comparatos renounced their interests which related back to the date of death of John Comparato.

This case involves a disposition of assets by death. The law of the state of New York clearly allows renunciations

of involving wrongful death proceeds and pain and suffering. In the instant case the Surrogates Court allowed the renunciations. The Internal Revenue Service had notice of the renunciations and did not respond in any manner to the Notice which was served upon it.

The reasoning of the Ninth Circuit in Mapes, supra, a case with a similar fact situation, is clearly the correct decision. The Ninth Circuit looked to the law of the State of Arizona, and found that renunciations were allowed under state law. Since state law allowed renunciations, the tax lien never attached to the estate proceeds.

Mitchell, not being applicable to the case at bar, the Court should grant this writ and follow the reasoning of Mapes and decide that the tax lien in this action did not attach to the assets

of the estate of John Comparato as Anthony and Mildred Comparato executed valid renunciations of their interest which related back to the date of death of John Comparato. There was not, nor had there ever been, a property interest to which the federal tax liens could attach.

CONCLUSION

This Court should grant this writ and reverse the judgment of the Second Circuit for the reasons set forth herein.

Respectfully submitted,

Anthony Comparato

ANTHONY COMPARATO,
Individually, and as the Administrator of the estate of John Comparato
Pro Se

Mildred Comparato

MILDRED COMPARATO
Pro Se

Millicent Comparato

MILLICENT COMPARATO
Pro Se

Diana Comparato Carlucci

DIANA COMPARATO CARLUCCI
Pro Se

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 1275 August Term 1993

(Argued March 28, 1994
Decided April 18, 1994)

Docket No. 93-6237 & 93-6293

UNITED STATES OF AMERICA,

Appellee,

v.

ANTHONY COMPARATO, Individually, and as the Administrator of the estate of John Comparato, MILDRED COMPARATO, MILLICENT COMPARATO, DIANA COMPARATO CARLUCCI,

Appellants,

Before:

TIMBERS. CARDAMONE, and KEARSE, Circuit Judges

Appeal from a summary judgment in favor of the government entered in the Eastern District of New York, Reena Raggi, District Judge, in an action which sought to reduce to judgment the tax liabilities of Anthony and Mildred Comparato.

Affirmed.

Richard F. Thurston, Denver, Colorado, for appellants.

Sara S. Holderness, Attorney, Dep't of Justice, Washington, DC (Loretta C. Argett, Asst. Atty. General, and Gary R. Allen and Gilbert S. Rothenberg, Attorney, Dep't of Justice; and Zachery W. Carter, United States Attorney, Brooklyn, N.Y., of the brief), for appellees.

TIMBERS, Circuit Judge:

Appellants appeal from a summary judgment in favor of the government entered in the Eastern District of New York, Reena Raggi, District Judge. The Court held that federal tax liens had attached to Anthony and Mildred Comparato's property interests in malpractice claims arising from their son's death. The court also held that Anthony and Mildred Comparato's renunciations of their interests in

their son's estate did not defeat the federal tax liens because the liens attached prior to the attempted renunciations. Summary judgment was entered against Anthony and Mildred Comparato for the tax liabilities for the years 1974, 1975, 1976, and 1985.

Appellants contend that Anthony and Mildred Comparato's renunciations of their interests in their son's estate defeated the federal tax liens. They claim that, pursuant to New York law, their renunciations retroactively extinguished their interests in their son's estate.

We affirm.

I.

We summarize only those facts and prior proceedings believed necessary to an understanding of the issues raised on

appeal.

The United States commenced this action to collect on tax assessments against Anthony and Mildred Comparato. Between 1985 and 1989, the Internal Revenue Service (IRS) assessed Anthony Comparato a total of $676,534.99 in taxes, interest and penalties for the tax years 1974-1976 and 1981-1985. In 1989, the IRS assessed Mildred Comparato a total of $215,515.22 in taxes interest and penalties for the years 1974-1976 and 1981-1984.

Anthony and Mildred Comparato's principal asset is $650.000.00 held in escrow accounts pending the outcome of the litigation related to their tax obligations. This money represents the proceeds of the settlement of malpractice actions arising from the death of John Comparato -- Anthony and

Mildred Comparato's quadriplegic son who died intestate on March 30, 1984. While John Comparato was still alive, a malpractice action which sought damages for pain and suffering was commenced in New York State Supreme Court New York Count. After John Comparato's death, the Queens County Surrogate's Court appointed Anthony Comparato as administrator of John's estate. As administrator, Anthony Comparato pursued the pain and suffering claim and commenced another action for wrongful death. Eventually, the pain and suffering claim was settled for $350,000. The wrongful death claim was settled for $500,000.

In 1989, Anthony Comparato petitioned the Surrogate's Court to approve the settlement and to permit payment of various expenses, including

legal fees. He asked that the net proceeds be distributed equally between himself and his wife as John's statutory distributees. In August 1989, before the Surrogate's Court acted on this request, the IRS served notices of levy on Baron & Vesel, attorneys for the Comparato estate, citing tax liens against Anthony and Mildred Comparato. The Surrogates's Court entered an order permitting payment of $200,000 in attorney's fees, the remainder of the money ($650,000) to be deposited in eleven separate escrow account pending the outcome of Anthony and Mildred Comparato's challenge to the federal tax assessments.

On April, 1991, Anthony and Mildred Comparato executed separate renunciations of their interests in John's estate pursuant to N.Y Estates,

Powers and Trusts Law, Section 2-1.11 (McKinney 1981 & Supp. 1994). On September 23, 1991, the Surrogate's Court permitted the renunciations to be filed despite the fact that the renunciations had not been filed within the nine-month statutory period.

On July 21, 1992, the Surrogate's Court permitted Diana and Millicent Comparato to intervene in the administration of their brother John's estate. Under New York law, they would succeed their parents as the statutory distributees of John. N.Y. Estates, Powers and Trusts Law, Section 4-1.1(a)(5) (McKinney Supp. 1994).

On July 15, 1992, the government commenced this action which sought to reduce to judgment the tax liabilities of Anthony and Mildred Comparato. In a July 2, 1993 order, the court held that

Anthony and Mildred Comparato, as the presumptive heirs and sole statutory distributees of their intestate son, acquired property interests in the proceeds of the malpractice claims as of the date of their son's death. The court also held that Anthony and Mildred Comparato could not renounce their interest in their son's estate to defeat the federal tax liens. The court granted summary judgment in favor of the government. On August 17, 1993, the court entered a final judgment pursuant to Fed. R. Civ. P. 54(b) with respect to the assessments for the years 1974-1976 and 1985 against Anthony Comparato, and for the years 1974-1976 against Mildred Comparato. Enforcement of the judgment was stayed pending a final settlement order by the Surrogate's Court.

Appellants contend that Anthony and Mildred Comparato never had an interest in the settlement proceeds to which the federal tax liens attached as a result of their renunciations pursuant to New York law. The parties stipulated to dismissal of the cross-appeal.

II.

Section 6321 of the Internal Revenue Code provides that "[i]f any person liable to pay any tax neglects or refuses to pay the same after demand, the amount (including any interest, additional amount, addition to tax, or assessable penalty . . .) shall be a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person". 26 U.S.C. Section 6321 (1988). The scope of Section 6321 "is broad and reveals . . . that Congress

meant to reach every interest in property that a taxpayer might have". United States v. National Bank of Commerce, 427 U.S. 713, 719-20 (1985). Moreover, a tax lien attaches automatically at the time of the assessment and remains in effect until the liability is satisfied. 26 U.S.C. Section 6322 (1988). State law controls whether a taxpayer has an interest in property to which a lien may attach. Aquilino v. United States, 363 U.S. 509, 512-13 (1960).

Appellants contend that Anthony and Mildred Comparato's renunciations of their interests in their son's estate retroactively extinguished any property interests they may have had in the malpractice claims. Absent the renunciations, appellants do not dispute that Anthony and Mildred Comparato had

property interests in the malpractice claims as the presumptive heirs and statutory distributees of their intestate son. Instead, appellants rely on New York law, which provides that "[a]ny beneficiary of a disposition may renounce all or part of his interest". N.Y. Estates, Powers and Trusts Law, Section 2-1.11(b)(1) (McKinney 1981). In New York, a renunciation is deemed "retroactive to the creation of the disposition" and it "has the same effect with respect to the renounced interest as though the renouncing person had predeceased the creator or the decedent." N.Y. Estates, Powers and Trusts Law, Section 2-1.11(d) (McKinney Supp. 1994). This statute creates a legal fiction that allows distributees to avoid attachment by creditors or the payment of taxes. In re Estate of

Scrivani, 455 N.Y.S.2d 505, 509, 116 Misc. 2d 204, 207-08 (Sup. Ct. N.Y. County 1982).

Appellants rely on Section 2-1.11 in contending that Anthony and Mildred Comparato's renunciations resulted in Diana and Millicent Comparato becoming the exclusive owners of the malpractice claims as of John's death on March 30, 1984. Since this date preceded the IRS's assessments against Anthony and Mildred Comparato, appellants contend that Anthony and Mildred Comparato did not have an interest in the malpractice claims pursuant to Section 2-1.11 at the time the federal tax liens attached. We reject this contention.

The court properly held that, once the federal liens attached to Anthony and Mildred Comparato's interests in the malpractice actions, their subsequent

renunciations pursuant to state law were not effective against the liens. United States v. Mitchell, 403 U.S. 190, 203-04 (1971) (a state law renunciation could not defeat a federal tax lien that attached to property rights that vested prior to the renunciation). The court held that both Anthony and Mildred Comparato had a vested interest in the settlement proceeds from the malpractice claims. Obviously, the government could have enforced the liens against Anthony and Mildred Comparato prior to the attempted renunciations. We hold that, once state law provided both Anthony and Mildred Comparato with a vested interest in the proceeds of the malpractice actions, federal law controlled whether their interests were exempt for levy by the United States. United States v. Rodgers, 461 U.S. 677, 683 (1983)

("[O]nce it has been determined that state law has created property interests sufficient for federal tax lien[s] to attach, state law 'is inoperative to prevent the attachment' of such liens") (quoting United States v. Bess, 357 U.S. 51, 57-57 (1958).

Section 6334(c) of the Internal Revenue Code provides that no property is exempt from levy other than property specifically made exempt by Section 6334(a). 26 U.S.C. Section 6334 (1988 & Supp. IV 1992). Since Section 6334(a) does not provide an exemption for Anthony and Mildred Comparato's interests in their son's estate, the federal tax liens are effective against their interests despite their subsequent renunciations pursuant to Section 2-1.11. Mitchell, supra, 403 U.S. at 205 (Section 6334 does not provide "for

automatic exemption of property that happens to be exempt from state levy under state law"). We reject appellants' contention that the retroactive ownership provision in Section 2-1.11 may defeat federal tax liens that attached prior to the attempted renunciations. Rodriguez v. Escabron Dev. Corp., 740 F.2d. 92, 98 (1 Cir. 1984) (the legal fiction of retroactive ownership recognized in the adverse possession statute could not be invoked to defeat federal liens).

We affirm the court's decision that Anthony and Mildred Comparato could not renounce their interests in their son's estate to defeat federal tax liens that attached prior to their attempted renunciations.

III.

To summarize:

We hold that he court properly held that appellants' renunciations of their interests in their deceased son's estate did not defeat federal tax liens that attached prior to the renunciations.

Affirmed.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
----------X

UNITED STATES OF AMERICA,

Plaintiff,

-against-

ANTHONY COMPARATO, individually and as Administrator of the Estate of JOHN COMPARATO; MILDRED COMPARATO; MILLICENT COMPARATO; DIANA COMPARATO CARLUCCI; BARON & VESEL, P.C.; and JAMES J. COLLINS, Clerk of the Surrogate's Court of New York, Queens County,

Defendants.
----------X

MEMORANDUM AND ORDER
(Filed July 8, 1993)

RAGGI, District Judge:

The United States brings this action to reduce to judgment the tax liabilities of Anthony and Mildred Comparato, which now exceed $890,000. Because the principal asset to which the United States would look to collect on the Comparatos' indebtedness is $650,000 in escrow accounts, which monies represent

the settlement proceeds of malpractice actions relating to the Comparatos' deceased son, plaintiff further seeks a judgment setting aside the Comparatos' attempts to renounce their interests in this property. The United States submits that a taxpayer cannot renounce a vested right to property to defeat a federal tax lien. Because this case presents no factual dispute as to the Comparatos' tax liabilities, the United States asks this court to resolve the renunciation issue in its favor on a motion for summary judgment. Having carefully considered the submissions of the parties and the applicable law, the court concludes that the attempted renunciations do not defeat the federal tax liens. Summary judgment is, therefore, granted in favor of the United States against Anthony and

Mildred Comparato.

Factual Background

1. The Comparatos' Tax Liabilities

The long history of civil and criminal tax disputes between the Comparatos and the United States is detailed in recent Tax Court opinion, Comparato v. Commissioner of Internal Revenue,[a] 65 T.C.M. (CCH) 1890 (T.C. 1993), familiarity with which is assumed. Because that decision resolves all outstanding disputes between the parties as to the Comparatos' tax liabilities, this court simply notes the following now-undisputed jeopardy assessments filed against the Comparatos by the Internal Revenue Service.

With respect to Anthony Comparato:

(1) On September 30, 1985, he was assessed $10,253.75 in tax, interest, and penalties for tax year

1983.

(2) On May 19, 1986, he was assessed $1,108.12 in tax, interest, and penalties for tax year 1984.

(3) On July 7, 1986, he was assessed $365,084.19 in tax, interest, and penalties for tax year 1985.

(4) On October 27, 1986, he was assessed $14,832.74 in tax, interest, and penalties for tax year 1982.

(5) On August 23, 1989, he was assessed a total of $153,565.00 representing $32,379.00 in tax, interest and penalties for tax year 1974, $72,197.00 for tax year 1975, and $48,989.00 for tax year 1976.

(6) On August 23, 1989, he was further assessed $131,727.19, representing $1,044.00 in tax, interest, and penalties for tax year 1981, an additional $23,791.75 for tax year

1982, an additional $20,327.50 for tax year 1983, and an additional $86,563.94 for tax year 1984.

These assessments total $676,534.99.

With respect to Mildred Comparato:

(1) On August 23, 1989, she was assessed $118,841.00, representing $20,447.00 in tax, interest, and penalties for tax year 1974, $58,416.00 for tax year 1975, and $39,978.00 for tax year 1976.

(2) On August 23, 1989, she was further assessed $96,674.22, representing $1,044.00 in tax, interest, and penalties for tax year 1981, $4,324.50 for tax year 1982, $3,966.00 for tax year 1983, and $87,339.72 for tax year 1984.

These assessments total $215,515.22.

2. Malpractice Actions Relating to the

Treatment and Death of John Comparato

John Comparato, the son of defendants Anthony and Mildred Comparato, was born a quadripalegic in 1965. An extremely sick child, he suffered two strokes before the age of seven and required constant care and medical attention. On March 30, 1984, John Comparato died interstate at the age of 19.

While John Comparato was still alive, a malpractice action was brought in his name in New York State Supreme Court against various defendants to recover damages for pain and suffering. After his son's death, Anthony Comparato was appointed administrator of his estate by the Surrogate's Court in Queens County and in that capacity pursued both the pain and suffering claim and a further action against the

same defendants for wrongful death. The claim for pain and suffering was ultimately settled for $350,000; the claim for wrongful death was settled for $500,000.

Sometime in 1989, the date not being clear from the record before this court, Mr. Comparato petitioned the Surrogate's Court inter alia to approve this settlement and to permit payment therefor of various expenses, including legal fees. He asked that the net proceeds be distributed equally as between himself and his wife as his son's statutory distributes. Before the court acted on this request, however, the Internal Revenue Service, (referred to herein as the "IRS"), in August 1989, served notices of levy on Baron & Vesel, attorneys for the Comparato estate, and on the defendants in the malpractice

actions, citing tax liens against both Anthony and Mildred Comparato. This prompted Mr. Comparato to again seek the assistance of the Surrogate's Court. On September 8, 1989, he advised that court that he and his wife were pursuing court challenges to the federal tax assessments. He asked the Surrogate to issue an order directing the payment of settlement funds into an escrow account pending final determination of the tax proceeding. On August 22, 1990, the Surrogate did issue such an order, but permitted payment of $200,000 in attorney fees, thereby leaving $650,000 to be deposited in eleven separate escrow accounts.

3. The Renunciations

In the interim, on March 6, 1990, tax counsel for the Comparatos wrote to District Counsel for the IRS expressing

his clients' desire to have the settlement proceeds applied to their tax indebtedness, subject to refund if they were to prevail on appeal. The record fails to reveal what, if any, steps the parties took toward this end. What is undisputed is that the following year, on April 10, 1991, Anthony and Mildred Comparato executed separate, but otherwise identical, renunciations of their interests in the estate of their deceased son pursuant to Section 2-1.11 of the New York Estate, Powers and Trusts Law (McKinney 1981 & Supp. 1993). Because these renunciations were not filed within the nine-month statutory period, the Comparatos were obliged to seek an extension of time from the Surrogate's Court. An order to show cause why the extension should not be granted was issued on August 10, 1991

and served on, among others, the Internal Revenue Service. The IRS, which enjoyed sovereign immunity from being joined in the New York action, did not respond to order.[1] On September 23, 1991, the Surrogate permitted the renunciations to be filed out of time. In re Estate of John Comparato, No. 1910/86 (Surr. Ct. Queens County Sept. 23, 1991).

On May 1, 1992, the Comparatos' remaining children, Diana and Millicent, petitioned the Surrogate's Court to intervene in the administration of their brother's estate, which application was granted on July 21, 1992. By law, they would succeed their parents as statutory distributes of John Comparato. See N.Y. Est. Powers & Trusts Law Sec. 4-1.1(a)(5) (McKinney Supp. 1993).

On July 15, 1992, the United States

commenced this action. The Surrogate's Court is apparently awaiting the outcome of this case before making any final disposition of the monies it ordered placed in escrow.

Discussion

I. Federal Tax Liens

Federal law provides that if a taxpayer fails to pay his due to the United States Treasury, there "shall be a lien in favor of the United States upon all rights and rights to property, whether real or personal, belonging to such person." 26 U.S.C. Sec. 6321 (1988). The statute's reach is deliberately broad and is meant " to reach every interest in property that a taxpayer might have." United States v. National Bank of Commerce, 472 U.S. 713, 720 (1985). Accordingly, a tax lien attaches as soon as the Secretary

of the Treasury issues an assessment of tax liability. 26 U.S.C. Sec. 6322 (1988). Moreover, the lien reaches both current and after-acquired property. Glass City Bank of Jeanette, Pa. v. United States, 326 U.S. 265, 267 (1945); accord United States v. McDermott, 113 S. Ct. 1526, 1527 (1993).

In this case, it is undisputed that, as a result of the various jeopardy assessments filed against Anthony Comparato, the United States has six liens in effect totalling $676,534.99. Similarly, it is undisputed that, as a result of the assessments filed against Mildred Comparato, the United States has two liens in effect totalling $215,515.22.

The threshold question in any case to enforce a tax lien is whether a taxpayer possesses "property" to which

such a lien could attach. The answer depends in the first instance on state law, which "controls in determining the nature of the legal interest which the taxpayer [has] in the property...." Aquilino v. United States, 363 U.S. 509, 513 (1960); accord United States v. National Bank of Commerce, 472 U.S. at 722; Don King Prods., Inc. v. Thomas, 945 F.2d 529, 534 (2d Cir. 1991) ("[W]hether the [federal] tax lien has attached depends on the state law question of ownership, since the lien can only attach to property that the taxpayer owns.").

In this case, the parties sharply disagree as to whether the Comparatos have any property right under New York law to the $650,000 settlement proceeds placed in escrow by the Surrogate's Court. This court finds that the

Comparatos do each possess separate property interests in these proceeds to which federal tax liens have attached pursuant to 26 U.S.C. Sec. 6321. But because New York law differs somewhat as to those proceeds attributable to the pain and suffering clam and those attributable to wrongful death, the court considers them separately.

A. The Pain and Suffering Claim

A malpractice action seeking damages for pain and suffering can survive the death of the original claimant and be pursued on behalf of his estate. N.Y. Est. Powers & Trusts Law Secs. 11-3.2(b))McKinney Supp. 1993), 11-3.3(a) (McKinney 1967); accord Antoine v. State, 103 Misc.2d 664, 668 &n.2, 426 N.Y.S.2d 917, 920-21 & n.2 (Ct. Cl. 1980). Thus, when Anthony Comparato, as administrator, settled his

deceased son's action for pain and suffering, he acquired an asset for the estate.

Under New York law, the presumptive heirs of an intestate child such as John Comparato are his parents, each of whom is entitled to receive one-half of the estate's net proceeds. N.Y., Est. Powers & Trusts Law Sec. 4-1.1)a)(4) (McKinney Supp. 1993). The Comparatos, however, contend that they have no right to the estate proceeds until the Surrogate issues a final order of distribution. In fact New York law is to the contrary.

A statutory distributee acquires 'a vested interest in the decedent's net estate" on the date of the person's death, not on the date of distribution or determination of the estate's proceeds. See In re Estate of Smith,

114 Misc.2d 346, 349, 451 N.Y.S.2d 546, 548-49 (Surr. Ct. Queens County 1982) (because interest vests on date of death, retroactive application of changes in law affecting inheritance violates due process); see also In re Wilson's Estate, 298 N.Y. 398, 403, 83 N.E.2d 852, 854 (1949) (legacy vests immediately upon death of testatrix); Kingsland v. Murray, 133 N.Y. 170, 174, 30 N.E. 845, 846 (1892) (title to real estate vests in heirs immediately upon death of owner); Turchiano v. Woods, 85 Misc.2d 991, 992, 381 N.Y.S.2d 775, 777 (Sup. Ct. Queens County 1076) (same as Kingsland); In re Fry's Estate, 28 Misc. 2d 949, 950, 218 N.Y.S.2d 755, 757 (Surr. Ct. Suffolk County 1961) (all real property not disposed of by will vests immediately in the statutory distributees).[2]

Applying this principle to the instant case, Anthony and Mildred Comparato's property rights as statutory distributees of their son's interstate estate vested when he died on March 30, 1984. Thus, to the extent the settlement proceeds of his action for pain and suffering are a part of that estate, the federal tax liens attach to the parents' interests in these proceeds.

B. Wrongful Death Claim

Under New York law, a wrongful death action, unlike one for pain and suffering, belongs to a decedent's statutory distributees, not to his estate.[3] E.g., George v. Mt. Sinai Hosp., 47 N.Y.2d 170, 176, 390 N.E.2d 1156, 1159, 417 N.Y.S.2d 231, 235 (1979) (citing N.Y.Est. Powers & Trusts Law Sec. 5-4.1); accord Dawson v. Langner,

106 A.D.2d 152, 153, 484 N.Y.S.2d 743, 744 (4th Dept 1985); Alberino v. Long Island Jewish-Hillside Medical Center, 87 A.D.2d 217 , 218, 450 N.Y.S.2d 857, 859 (2d Dep't 1982); Antoine v. State, 103 Misc.2d at 668 n.2, 426 N.Y.S.2d at 921 n.2. Moreover, this "property right ... accrues to the distributees and vests in them at decedent's death." Alberino v. Long Island Jewish-Hillside Medical Center, supra (citations omitted (emphasis in original); see Gore v. Northeast Airlines, Inc., 373 F.2d 717, 723 (2d Cir. 1967) (citing Meekin v. Brooklyn Heights R.R. Co., 164 N.Y. 145, 149, 58 N.E. 50, 51 (1900).

Since it is undisputed that Anthony and Mildred Comparato were the sole presumptive distributees of their son John at the time of his death, see Reed v. County of Scholharie, 51 A.D.2d 499,

500-01, 382 N.Y.S.2d 371, 372-73 (3d Dep't 1976) (absent disqualification, parents are sole statutory distributees of intestate child regardless of existence of siblings), this court finds that each parent has a vested interest in the settlement proceeds of the wrongful death action to which a federal tax lien can attach.

It should be noted, however, that, precisely because the proceeds of a wrongful death action belong to the statutory distributees and not to the estate, the law does not presume equal distribution of shares. See Hanson v. County of Erie, 120 A.D.2d 15, 136-37, 507 N.Y.S.2d 778, 779 (4th Dep't 1986). Instead, each distributee receives damages in proportion to the injuries suffered by him or her, as determined after a hearing in Surrogate's Court.

N.Y. Est. Powers & Trusts Law Sec. 5-4.4(a)(1) (McKinney 1981 & Supp. 1993); see In re Estate of Acquafredda, ____ A.D.2d ____, ____. 586 N.Y.S.2d 839, 840 (2d Dep't 1993). Thus, the degree to which the United States will be able to recover on its discrete liens as against Anthony Comparato and Mildred Comparato may turn on the amount the Surrogate awards each parent for their son's wrongful death. But that fact does not later the court's conclusion that the liens do attach to the Comparatos' respective interests in this settlement fund.

II. State Law Renunciations

The Comparatos submit that, even if, at the time of their son's death, they did acquire property rights to his estate and to a claim for wrongful death, these rights have now been

extinguished by their formal renunciations of interest, signed April 10, 1991 and filed with the approval of the Surrogate on September 23, 1991. In these documents, both Anthony and Mildred Comparato swore "irrevocably [to] renounce wholly all of the right, title, and interest in and to any portion of the estate of JOHN COMPARATO."

By law, New York permits "[a]ny beneficiary of a disposition [to] renounce all or part of his interest. . . ." N.Y. Est. Powers & Trusts Law Sec. 2-1.11(b)(1) (McKinney 1981). Moreover, since such a renunciation is deemed "retroactive to the creation for the disposition," it "has the same effect with respect to the renounced interest as though the renouncing person had predeceased the creator or the decedent

. . . ." N.Y. Est. Powers & Trusts Law Sec. 2-1.11(d) (McKinney Supp. 1993). In short, a renunciation under New York law gives rise to a legal fiction designed deliberately to allow distributees to avoid the attachment of their interests in property. See In re Estate of Scrivani, 116 Misc.2d 204, 207-08, 455 N.Y.S.2d 505, 509 (Sup. Ct. N.Y. County 1982) ("It is settled law in New York that a distributee may freely renounce a testate or intestate disposition for any reason, or no reason, or, indeed, the object of frustration creditors or avoiding taxes.").

Assuming arquendo that the Comparatos' renunciations are valid under New York law, their scope and effect is less than clear.[4] For example, the renunciations speak only of

the Comparatos' interest in "the estate of JOHN COMPARATO." Since the wrongful death action is not an asset of the estate, a question arises as to the applicability of these renunciations to that portion of the settlement proceeds.

Even if the court were to conclude that the renunciations were intended to apply to Comparatos' interests in the wrongful death as well as the pain and suffering proceeds, the United States submits that such renunciations would not be permissible under Sec. 2-1.11. In support, it cites In re Estate of Summrall, 93 Misc.2d 420, 402 N.Y.S.2d 770 (Surr. Ct. Bronx County 1978), in which the court expressed the view that wrongful death proceeds could not be renounced by a distributee (1) because Sec. 2-1.11(1)(1), as then written, "contain[ed] a definition of

'disputation' that clearly d[id] not include a recovery for wrongful death;" and (2) because the proceeds of a wrongful death suit constitute a property interest that vested in the distributees at the time of the decedent's death. Id. at 421-22, 402 N.Y.S.2d at 772. This analysis, however, may be dicta since the Summrall court did, in the end, permit renunciation because the only party adversely affected, the State Department of Social Services, failed to contest the renunciation and was, thereafter, deemed to have consented. Moreover, defendants point the court to a more recent decision, In re Estate of Dominguez, 143 Misc.2d 1010, 541 N.Y.S.2d 934 (Surr. Ct. Kings County 1989), in which it was expressly held that a spouse could renounce wrongful

death proceeds. In so ruling, the court relied on a 1980 amendment to Sec. 2-1.11, expanding the definition of "disposition" to include interests created by "operation of law," which it held included wrongful death actions. Id. at 1012-13, 541 N.Y.S.2d at 936-37. The United States argues that Dominquez is wrongly decided, because an asset, such as a wrongful death claim, which does not belong to a decedent's estate, can never be part of a "disposition."

In fact, this court need not resolve this question of New York law to dispose of this case, for even if Sec. 2-1.11 renunciations can apply of a distributee's interest in wrongful death proceeds, they could not displace a federal tax lien on such proceeds nor, indeed, a federal tax lien on proceeds of a claim for pain and suffering. This

is because, for purposes of enforcing a federal tax lien, state law is relevant only to the determination of whether a taxpayer has a right to certain property, not to whether he can thereafter renounce his right. Indeed, "once it has been determined that state law has created property interests sufficient for federal tax lien[s] to attach, state law 'is inoperative to prevent the attachment' of such liens." United States v. Rodgers, 461 U.S. 677, 683 (1983) (quoting United States v.Bess, 357 U.S. 51, 56-57 (1958)); accord United States v. National Bank of Commerce, 472 U.S. at 722.

The Supreme Court specifically addressed the issue of state law renunciations of federally-taxable property interests in United States v. Mitchell, 403 U.S. 190 (1971). In that

case, a divorced spouse sought to renounce her interest in marital assets, as permitted by Louisiana law. That state conferred on a married woman an interest in community property equivalent to that of her husband. This interest vested at the moment the property was acquired. The Supreme Court held that a renunciation under state law could not upset a federal tax lien that attached to property rights that vested before the renunciation. Id. at 203-04; accord United States v. Rodgers, 461 U.S. at 683.

Defendants seek to limit Mitchell to its facts, arguing that the divorced spouse in the case had actually owned and possessed her share of the community property, a fact not altered by her subsequent renunciation. United States v. Mitchell, 403 U.S. at 204. By

contrast, they submit that they have never possessed any portion of the settlement proceeds her at issue. Indeed, the very purpose of New York's renunciation statute, with its fictional presumption, is to make it impossible for persons who would otherwise be distributees ever to be deemed in possession.

The argument is unpersuasive. As already noted, New York law is relevant to thee court's analysis only in determining whether at the time of the jeopardy assessments the Comparatos possessed a property right to the settlement proceeds had vested under New York law at the time of their son's death, such that federal tax liens attached to these assets when the assessments were filed. The fact that several years later the Comparatos

sought to renounce their interest and that New York appears ready to honor these renunciations to the point of creation a legal fiction that the parents predeceased their son, is, at best, relevant "in connection with a tax or other obligation the collection of which is controlled by state law." United States v. Mitchell, 403 U.S. at 204. But such an exemption does not affect federal liens. "Federal law governs what is exempt from federal levy." Id. Indeed, in Mitchell, the Supreme Court noted that, once a property interest exists, the only exemptions from levy are those specified in 26 U.S.C. Sec. 6334(a) (1988 & Supp. III 1991): "This language is specific and it is clear and there is no room in it for automatic exemption of property that happens to be exempt from state

levy under state law." 403 U.S. at 205.

Defendants nevertheless urge this court to follow the holding in United States v. McCracking, 189 F. Supp. 632 (S.D. Ohio 1960), a case in which a federal district court did hold that a taxpayer's renunciation of interest in a testamentary bequest meant that he possessed no property or rights to property to which a federal tax lien could attach. A similar result was reached in an unreported case, Stickell v. United States, No, 77 Civ. 1045, 1978 WL 1185, at *2-4 (S.D. Ill.1978). McCrackin, however, predates Mitchell, raising questions as to its continued viability., Although Stickell post-dates Mitchell, it does not cite the Supreme Court opinion much less seek to distinguish it. This court finds that the holding in Mitchell cannot be

reconciled with McCrackin or Stickell.

More persuasive is the reasoning in United States v. Solheim, No. 89 Civ. 80, 1990 WL 283589, at *2-3 (D. Neb. Feb. 13, 1990), wherein the court, relying on Mitchell, held that a son's renunciation of his interest in a trust established by his father could not relate back to defeat a federal tax lien that had already attached to his property interest in the trust. The Eighth Circuit later affirmed on other grounds. United States v. Solheim, 953 F.2d 379, 382 (8th Cir. 1992) (state court order had treated renunciation as effective on date executed, without the benefit of any relation-back theory).

Because this court finds that the Comparatos, as their son's statutory distributees, each acquired vested property rights at the time of his death

to his estate, which included his pending malpractice action to recover damages for pain and suffering, and to an action for his wrongful death, it concludes that federal tax liens attached to these assets at the time jeopardy assessments were filed, which liens could not be displaced years later by the filing of state law renunciations.

III. Federal Fraudulent Conveyance Act

The United States contends that the Comparatos' renunciations of their interests in the settlement proceeds constitute fraudulent conveyances under the Federal Debt Collection Procedure Act of 1990 ("FDCPA"), 28 U.S.C. Secs. 3001-3308 (Supp. III 1991), such as to provide a separate basis for granting judgement in the government's favor.

The court does not rely on this

ground in entering judgment in favor of the United States since a number of issues relevant to the applicability of the FDCPA to this case would need further briefing before the court could rule.

Conclusion

For the reasons stated herein, the court finds that valid federal tax liens in the total amount of $676,534.99 as to Anthony Comparato and in the total amount of $215,515.22 as to Mildred Comparato have attached to these defendants' separate interests in the settlement proceeds of malpractice actions for their son's pain and suffering before his death and for his wrongful death. The Comparatos' subsequent attempt to renounce their interest in these proceeds cannot defeat the federal government's right to

enforce its liens. Summary judgment is to be entered in favor of the United States and against Anthony and Mildred Comparato in the amount of the liens, plus such additions and interest as the parties agree have further accrued. The parties are to submit to the court a proposed order specifying this total agreed upon amount within ten days.

SO ORDERED.

Dated: Brooklyn, New York
July 2, 1993

REENA RAGGI
UNITED STATES DISTRICT JUDGE

Footnotes

[a] The United States Tax Court has not yet issued its final decision as to the amount of the Comparatos' individual tax liabilities for the tax years 1981, 1982, 1983, and 1984. See Comparato v. Commissioner, 65 T.C.M. (CCH) at 1903; Tax Ct. R. 155(a) (1993).

[1] The United States submits, and the Comparatos do not dispute that the United States was not obliged to respond to the order to show cause since it was not formally sued pursuant to 28 U.S.C.

Section 2410 (1988 & Supp. III 1991), which permits the United States to be named as a party to state actions to quiet title to property, whether real or personal, on which the United States claims a lien.

[2] All distinctions at law between real and personal property were eliminated as of September 1, 1967. See N.Y. Est. Powers & Trusts Law Sec. 1-2.15 (McKinney 1981); 38 N.Y. Jur.2d, Decedents' Estates Sec. 54 (1984)

[3] The law does provide for both actions to be pursued simultaneously by the estate representative. N.Y. Est. Powers & Trusts Law Secs. 5-4.1(1) (McKinney Supp. 1993, 11-3.3(b)(2) (McKinney 1967). This is, of course precisely what Mr. Comparato did.

[4] Under New York law, a person can lose the power to renounce an interest in property if "by passage of time and by word and conduct," he has in effect accepted his interest. In re Wilson's Estate, 295 N.Y. at 405, 83 N. E. .1 at 855. In this case, it is unclear whether the Surrogate considered whether (1) the passage of over six years between John Comparato's death and his parents attempted renunciations, when considered in light of (2) his father's active pursuit of the malpractice claims here at issue, (3) his parents' 1989 request to have the Surrogate award them the settlement proceeds of these claims as their son's statutory distributees, and (4) the Comparato's March 6, 1990 offer, made through counsel to the IRS to have their interests in these

proceeds applied to the tax indebtedness, constituted an "acceptance" such as to preclude renunciation. Of course, it is not this court's task to determine whether the Comparatos' renunciations should be given any effect by the courts of New York. Its inquiry is limited to the effect of these attempted renunciations on the federal tax liens.

No. 94-108

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In the Supreme Court of the United States

OCTOBER TERM, 1994

ANTHONY COMPARATO, INDIVIDUALLY AND AS ADMINISTRATOR OF THE ESTATE OF JOHN COMPARATO, DECEASED, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether a federal tax lien that attached to a taxpayer's interest in property upon the creation of that interest can thereafter be avoided by the taxpayer's renunciation of that interest under state law.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	6
Conclusion	13

TABLE OF AUTHORITIES

Cases:

Alberino v. *Long Island Jewish-Hillside Medical Center*, 450 N.Y.S.2d 857 (App. Div. 1982)	7
Antoine v. *State*, 426 N.Y.S.2d 917 (Ct. Cl. 1980)	8
Aquilino v. *United States*, 363 U.S. 509 (1960)	7
Comparato v. *Commissioner*, 58 T.C.M. (CCH) 775 (1989)	2
Comparato v. *Commissioner*, 65 T.C.M. (CCH) 1890 (1993)	2
Don King Productions, Inc. v. *Thomas*, 945 F.2d 529 (2d Cir. 1991)	7
Estate of Schiffman, 430 N.Y.S.2d 229 (Surr. Ct. 1980)	10
George v. *Mt. Sinai Hosp.*, 390 N.E.2d 1156 (N.Y. 1979)	8
Glass City Bank v. *United States*, 326 U.S. 265 (1945)	8
Mapes v. *United States*, 15 F.3d 138 (9th Cir. 1994)	6, 11, 12
United States v. *Bess*, 357 U.S. 51 (1958)	7, 8
United States v. *Irvine*, 114 S. Ct. 1473 (1994)	6, 8, 9, 12, 13
United States v. *Mitchell*, 403 U.S. 190 (1971)	9, 10
United States v. *Rodgers*, 461 U.S. 677 (1983)	8
United States v. *Security Trust & Savings Bank*, 340 U.S. 47 (1950)	13
United States v. *Solheim*, 91-1 U.S.T.C. (CCH) ¶50,108 (D. Neb. 1991), aff'd, 953 F.2d 379 (8th Cir. 1992)	11

Cases—Continued: Page

United States v. *Wingfield*, 822 F.2d 1466 (10th Cir. 1987), cert. dismissed, 486 U.S. 1019 (1988) 9-10

Wilson's Estate, In re, 83 N.E.2d 852 (N.Y. 1949) 7

Statutes and rule:

Internal Revenue Code (26 U.S.C.):

26 U.S.C. 6321 ..... 2, 7, 10

26 U.S.C. 6322 ..... 2, 7, 8

26 U.S.C. 6334(a) 9

26 U.S.C. 6334(c) 9

26 U.S.C. 6502 7

28 U.S.C. 2410 4

N.Y. Est. Powers & Trusts Law (McKinney 1981 & Supp. 1994):

§ 2-1.11(b)(1) (McKinney 1981) 4

§ 2-1.11(b)(2) (McKinney 1981) 4

§ 2-1.11(d) (McKinney Supp. 1994) 4

§ 4-1.1(a)(4) (McKinney Supp. 1994) 3

§ 4-1.1(a)(5) (McKinney Supp. 1994) 5

Fed. R. Civ. P. 54(b) 5

In the Supreme Court of the United States

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No. 94-108

ANTHONY COMPARATO, INDIVIDUALLY AND AS ADMINISTRATOR OF THE ESTATE OF JOHN COMPARATO, DECEASED, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-16a) is reported at 22 F.3d 455. The opinion of the district court (Pet. App. 17a-52a) is reported at 850 F. Supp. 153.

JURISDICTION

The judgment of the court of appeals was entered on April 18, 1994. The petition for a writ of certiorari was filed on July 15, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In 1985 and 1986, the Internal Revenue Service made assessments against petitioners Anthony and Mildred Comparato in the amount of $254,596 for unpaid federal income taxes, interest and penalties for the 1981-1984 tax years. In 1986, the Service made a further assessment against petitioner Anthony Comparato in the amount of $365,048 for the 1985 tax year. On August 23, 1989, the Service made additional assessments against petitioners Anthony and Mildred Comparato in the amount of $272,406 for the 1974, 1975, and 1976 tax years. Pet. App. 19a-21a. At the time each of these assessments was made, a federal tax lien arose and attached by operation of law to all of the "property and rights to property, whether real or personal, belonging to" the Comparatos. See 26 U.S.C. 6321; 26 U.S.C. 6322.[1]

2. Petitioners Anthony and Mildred Comparato had a son who died intestate on March 30, 1984. While their son was still alive, a malpractice action was brought in his name in New York State Supreme Court against various defendants to recover damages for pain and suffering. After his son's death, Anthony Comparato was appointed administrator of his estate and, in that capacity, pursued the pain and suffering claim. In addition, he made a claim against the same defendants for wrongful death. These claims were ultimately settled for a total of $850,000 (Pet. App. 5a).

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[1] In separate cases, the Tax Court upheld the assessments against petitioners Anthony and Mildred Comparato for the years 1974 through 1976 (*Comparato* v. *Commissioner*, 58 T.C.M. (CCH) 775 (1989)) and for the years 1981 through 1984 (*Comparato* v. *Commissioner*, 65 T.C.M. (CCH) 1890 (1993)). The latter decision had not been entered at the time that the present case was commenced.

In 1989, Anthony Comparato filed a petition in state court to obtain approval of the settlement and to permit payment of various expenses, including legal fees. He further requested that the remaining proceeds of the settlement be distributed to himself and his wife as their son's statutory distributees[2] Before the court acted on the request, the Internal Revenue Service served notices of levy on the attorneys for the estate and on the defendants in the malpractice actions, asserting that the preexisting federal tax liens attached to all property and rights to property of Anthony and Mildred Comparato, including their interests in the settlement proceeds (Pet. App. 5a-6a).

In response, Anthony Comparato advised the state court that he and his wife had sought review of the federal tax assessments (see note 1, *supra*) and requested the state court to direct payment of the settlement funds into an escrow account pending completion of the Tax Court proceedings. The state court permitted distribution of $200,000 from the settlement proceeds to pay attorney's fees and directed the balance of $650,000 to be deposited in eleven separate escrow accounts (Pet. App. 6a).

On March 6, 1990, counsel for Anthony and Mildred Comparato wrote the Internal Revenue Service to express the couple's desire to have the settlement proceeds applied to their outstanding tax indebtedness. The record fails to reveal what, if any, steps the parties took toward this end (Pet App. 24a-25a).

3. On April 10, 1991, more than six years after the death of their son, Anthony and Mildred Comparato

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[2] Under New York law, the parents are designated as the sole distributees of an intestate child's estate. N.Y. Est. Powers & Trusts Law § 4-1.1(a)(4) (McKinney Supp. 1994).

attempted to renounce all of their right, title, and interest in the estate of their deceased son by filing documents entitled "Renunciation of Interest" in state court (Pet. App. 6a-7a).[3] Because these purported renunciations were not filed within the nine-month period provided by state law (see note 3, *supra*), the Comparatos petitioned the state court for an extension. An order to show cause why the extension should not be granted was issued by the state court. That order was served on the IRS, which did not respond to the order (Pet. App. 25a-26a).[4] The state court thereafter permitted the renunciations to be filed out of time (*id.* at 7a).

After the Comparatos filed their reunciation, the state court permitted the couple's remaining children—petitioners Diana Comparato Carlucci and Millicent Comparato—to intervene in the administration of their brother's estate. By law, they would succeed their

[3] New York law permits "[a]ny beneficiary of a disposition [to] renounce all or part of his interest" "within nine months after the effective date of the disposition." N.Y. Est. Powers & Trusts Law § 2-1.11(b)(1) and (2) (McKinney 1981). The time to file and serve a renunciation "may be extended, in the discretion of the court, on a petition showing reasonable cause and on notice to such persons and in such manner as the court may direct." N.Y. Est. Powers & Trusts Law § 2-1.11(b)(2) (McKinney 1981). A renunciation is deemed "retroactive to the creation of the disposition" and it "has the same effect with respect to the renounced interest as though the renouncing person had predeceased the creator or the decedent." N.Y. Est. Powers & Trusts Law § 2-1.11(d) (McKinney Supp. 1994).

[4] The parties agree (Pet. App. 50a-51a) that the United States, which was not a party to the state court action, was not obligated to respond to the show cause order. The order was not entered in a suit commenced under 28 U.S.C. 2410, which permits the United States to be named as a party to state actions to quiet title to property on which the United States claims a lien.

parents as statutory distributees of their brother. See N.Y. Est. Powers & Trusts Law § 4-1.1(a)(5) (McKinney Supp. 1994); Pet. App. 7a.

4. The United States thereafter commenced this action in federal district court seeking (i) to reduce to judgment the tax assessments against petitioners Anthony and Mildred Comparato for the tax years 1974 through 1976, 1981 through 1984 and 1985, (ii) to foreclose the federal tax liens against all of the couple's property and rights to property, including their interests in the settlement proceeds, and (iii) to set aside as fraudulent the conveyances effected by the couple's purported renunciation of their interest in their son's estate (Pet. App. 4a-5a). Because the Tax Court case involving the couple's taxes for 1981 through 1984 was still pending (see note 1, *supra*), the government moved for partial summary judgment with respect to the years (1974 through 1976 and 1985) for which final determinations of tax had been made.

The district court granted the government's motion and entered a final judgment pursuant to Fed. R. Civ. P. 54(b).[5] The court held that (i) Anthony and Mildred Comparato acquired vested interests in the wrongful death and pain and suffering claims as of March 30, 1984,

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[5] Rule 54(b) of the Federal Rules of Civil Procedure provides, in pertinent part, as follows:

> **Judgment Upon Multiple Claims or Involving Multiple Parties.** When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment.

the date of their son's death, (ii) the federal tax liens attached to those interests as of the dates of assessment and (iii) the Comparatos' subsequent state-law renunciation of their interest in the settlement proceeds did not relate back to defeat the federal tax liens (Pet. App. 8a).

5. The court of appeals affirmed. The court held that Anthony and Mildred Comparato had vested property interests in the wrongful death and pain and suffering claims at the time the federal liens attached and that the Comparatos' interests in those claims were not exempt from levy under federal law (Pet. App. 13a). The court further concluded that the federal tax lien on the Comparatos' property remained effective notwithstanding the couple's subsequent state-law renunciations (*id.* at 14a). The court held that the fact that state law treated the couple's renunciations as effective *ab initio*, to the date of the creation of those interests, did not defeat the federal tax liens that had attached to those interests (*id.* at 15a).

ARGUMENT

The court of appeals correctly held that a state law that permits retroactive renunciation of a property interest cannot defeat a federal tax lien that attached to that interest prior to the renunciation. While, as petitioner notes (Pet. 12), the decision in this case could be said to conflict in principle with the decision of the Ninth Circuit in *Mapes* v. *United States*, 15 F.3d 138 (1994), the *Mapes* decision was entered before this Court decided *United States* v. *Irvine*, 114 S. Ct. 1473 (1994). We doubt that, after *Irvine*, the Ninth Circuit would adhere to its decision in *Mapes*. Further review of the decision in this case is therefore not warranted.

1. Section 6321 of the Internal Revenue Code provides that, "[i]f any person liable to pay any tax neglects or refuses to pay the same after demand, the amount (including any interest, additional amount, addition to tax, or assessable penalty * * *) shall be a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person." 26 U.S.C. 6321. The lien imposed by Section 6321 arises upon assessment and continues until the underlying tax liability is satisfied or the statute of limitations expires. See 26 U.S.C. 6322, 6502. Since Section 6321 "creates no property rights but merely attaches consequences, federally defined, to rights created under state law" (*United States* v. *Bess*, 357 U.S. 51, 55 (1958)), a court must first look to state law to determine whether a property right exists against which a lien can be asserted. *Aquilino* v. *United States*, 363 U.S. 509, 512-514 (1960); *Don King Productions, Inc.* v. *Thomas*, 945 F.2d 529, 534 (2d Cir. 1991).

Under the state law applicable to this case, Anthony and Mildred Comparato, as the presumptive heirs and sole statutory distributees of their intestate son, each acquired vested property rights to the wrongful death and pain and suffering proceeds as of the date of their son's death, March 30, 1984. See *In re Wilson's Estate*, 83 N.E.2d 852, 854 (N.Y. 1949); *Alberino* v. *Long Island Jewish-Hillside Medical Center*, 450 N.Y.S.2d 857, 859 (App. Div. 1982) ("cause of action for wrongful death is a property right belonging solely to the distributees of the decedent, and accrues to the distributees and *vests* in them at decedent's death"). When the federal tax assessments were made in 1985, 1986, and 1989, federal tax liens arose and attached to all of the couple's property and rights to property, including their vested interests in the wrongful death and pain and suffering

proceeds. See 26 U.S.C. 6322; *Glass City Bank* v. *United States*, 326 U.S. 265, 267 (1945).

Contrary to petitioners' contention (Pet. 16-17, 18-19), these federal tax liens were not defeated by the subsequent renunciation by Anthony and Mildred Comparato of their interests in their son's estate or by the fact that state law deems those renunciations to be effective *ab initio*, retroactive to the creation of the interests.[6] As the court of appeals correctly concluded (Pet. App. 13a), state law is relevant only in determining whether Anthony and Mildred Comparato had a property interest to which the federal tax lien could attach. Once that determination is made, "federal law determines whether and to what extent those interests will be taxed." *United States* v. *Irvine*, 114 S. Ct. at 1481; *United States* v. *Rodgers*, 461 U.S. 677, 683 (1983) ("once it has been determined that state law has created property interests sufficient for federal tax lien[s] to attach, state law 'is inoperative to prevent the attachment' of such liens"), quoting *United States* v. *Bess*, 357 U.S. at 56-57.

[6] Moreover, petitioners err in contending (Pet. 17-18) that they renounced their interests in the wrongful death proceeds. As the district court noted (Pet. App. 38a-39a), the Comparatos simply renounced their interests in their son's estate. Under New York law, a wrongful death action is *not* an asset of the estate; instead, it belongs to the statutory distributees in their own right. See *George* v. *Mt. Sinai Hosp.*, 390 N.E.2d 1156, 1159 (N.Y. 1979); *Antoine* v. *State*, 426 N.Y.S.2d 917, 921 n.2 (Ct. Cl. 1980). Because Anthony and Mildred Comparato only renounced their interests in their son's estate, and did *not* renounce their interests in the wrongful death proceeds, even if state law principles of renunciation could defeat a federal tax lien, the renunciations in this case did not affect the tax lien that attached to the wrongful death proceeds.

Under federal law, "no property or rights to property shall be exempt from levy other than the property specifically made exempt by [26 U.S.C. 6334(a)]." 26 U.S.C. 6334(c); see *United States* v. *Mitchell*, 403 U.S. 190, 204 (1971). Because 26 U.S.C. 6334(a) does not provide an exemption for the interests of Anthony and Mildred Comparato in the wrongful death and pain and suffering proceeds, the court of appeals correctly concluded that the federal tax liens are effective against those interests.

The fact that state law recognizes the legal fiction under which a valid, subsequent renunciation of this property interest is deemed to be effective *ab initio* does not displace the federal liens that had already attached to this property. As this Court explained in an analogous context in *United States* v. *Irvine*, 114 S. Ct. at 1482, in determining the existence of a property interest, federal law looks to the fact of ownership and "is not struck blind" by state law "legal fiction[s]" designed to ensure that a "disclaimant's creditors are barred from reaching the disclaimed property" (*ibid.*).

In this case, the Comparatos in fact enjoyed ownership of this property interest for six years, during which period the federal tax lien attached to their interests. Federal law is not "struck blind" by New York's legal fiction under which, upon the filing of their renunciations, the Comparatos are deemed never to have owned an interest in the property. See *United States* v. *Wingfield*, 822 F.2d 1466, 1475 (10th Cir. 1987) ("doctrine of relation back under state law cannot be held to subvert the constitutional power to lay and collect taxes"), cert.

dismissed, 486 U.S. 1019 (1988).[7] While New York may provide for the extinguishment of a state creditor's claims by means of a renunciation and the doctrine of relation back, the State's legal fiction has no effect on the determination to be made, under federal law, of whether the taxpayer in fact had a "property" interest (within the meaning of 26 U.S.C. 6321) at the time that the federal liens attached.[8]

[7] Petitioners' reliance (Pet. 19-20) on *Estate of Schiffman*, 430 N.Y.S.2d 229 (Surr. Ct. 1980), in which a renunciation was held effective against a competing state creditor, is thus unavailing.

[8] This Court's decision in *United States* v. *Mitchell*, *supra*, concerning an analogous issue, is instructive here. *Mitchell* presented the issue of whether a married woman living in a community property state is liable for federal income tax on one-half the community income realized during the existence of the marriage even though she exercised her statutory right of exoneration pursuant to state law. The taxpayer in *Mitchell* conceded that her interest in the subject (community) property was vested. 403 U.S. at 203. In rejecting the contention that the right under state law to renounce the community and to place herself in the same position as if it had never existed is substantive, the Court held (*id.* at 204 (citation omitted)):

> Mrs. Mitchell's renunciation "came long after her liabilities for the annual income taxes here in issue had attached." Further, "[t]his right of the wife to renounce or repudiate must not be misconstrued as an indication that she had never owned and possessed her share, for that fact was not denied; but she did have, under the principles of community property, the right to revoke her ownership and possession. . . ."
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> * * * [A]n exempt status under state law does not bind the federal collector. Federal law governs what is exempt from federal levy.

In this case, Anthony and Mildred Comparato likewise seek to utilize a right of renunciation under state law to shield them from their federal tax liability long after their property interests had

2. The decision in this case correctly applied these principles. We agree with petitioners (Pet. 12, 23), however, that this decision could be said to conflict in principle with the Ninth Circuit's decision in *Mapes* v. *United States*, 15 F.3d 138 (1994). In *Mapes*, the taxpayer's mother died, leaving him one-half of her estate. At the time of his mother's death, the taxpayer and his wife owed the United States approximately $500,000 in assessed taxes and statutory additions to tax. One week after his mother's death, in an effort to prevent the government's lien from attaching to his interest in his mother's estate, the taxpayer renounced his interest in favor of his children. *Id.* at 139.

The government argued in *Mapes* that (i) upon his mother's death, the taxpayer acquired a vested interest in his mother's estate under the applicable local law, (ii) an existing federal tax lien attached at that time to that vested interest and (iii) the taxpayer's subsequent renunciation of his interest did not defeat the existing federal lien. 15 F.3d at 139-140, 141 n.4. The Ninth Circuit rejected the government's submission. While acknowledging that "federal law is controlling on the question of whether Mapes had a lienable interest in his mother's estate," the court concluded that "the fundamental question [is] whether Mapes had any interest in the property, lienable or not." *Id.* at 140. The court held that "[f]or the answer to that question we

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vested. Petitioners' attempt to distinguish the case from *Mitchell* (Pet. 21-22) is therefore unavailing. See also *United States* v. *Solheim*, 91-1 U.S.T.C. (CCH) ¶ 50,108 (D. Neb. 1991), aff'd, 953 F.2d 379, 382 (8th Cir. 1992), where the district court, relying on *Mitchell*, held that a son's renunciations of his interest in a trust established by his father could not relate back to defeat a federal tax lien that had attached to his property interest in the trust.

must look to state law, not federal law." *Ibid.* Noting that the taxpayer's renunciation (one week after his mother's death) was timely and valid under state law, the court held that, because the renunciation relates back to the date of death under state law, the taxpayer never had any interest in the property to which the federal tax lien could attach. *Ibid.* The court concluded that the federal tax lien was therefore ineffective against the taxpayer's interest in his mother's estate. *Ibid.*

The facts of the present case and of *Mapes* differ markedly with respect to the timing of the taxpayers' renunciation of their property interests.[9] Nonetheless, the reasoning of the court of appeals in *Mapes*—that a renunciation under state law can relate back to defeat a federal tax lien that previously attached to the taxpayer's property interest—cannot be reconciled with the reasoning of the decision in this case or with the reasoning of this Court's recent decision in *United States* v. *Irvine*, *supra*. In *Irvine*, which was decided three months after the Ninth Circuit entered its decision in *Mapes*, this Court emphasized that, in determining (under an analogous statutory phrase) whether a taxpayer possesses an interest in "property," federal courts are to look to factual realities and not be "struck blind" by state-law "legal fiction[s]" that permit

[9] In *Mapes*, the renunciation occurred only one week after the interest was created and the Ninth Circuit concluded that the taxpayer had not accepted the benefits of the bequest prior to his renunciation. 15 F.3d at 141. In the present case, by contrast, it is evident that petitioners Anthony and Mildred Comparato sought to enjoy the benefits of the wrongful death and pain and suffering proceeds prior to their purported renunciations some six years later. In particular, they requested the state court to award the proceeds to them and, at one point, proposed using these proceeds to satisfy their federal tax debts (Pet. App. 24a-25a, 51a-52a).

renunciations of ownership to be retroactively effective. See 114 S. Ct. at 1482.[10]

We anticipate that, if the Ninth Circuit were to address a case after *Irvine* that presented facts similar to those of the present case, the court would reach the same conclusion reached by the Second Circuit in this case. We therefore do not believe that a conflict presently exists among the courts of appeals that requires this Court's resolution.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[10] See also *United States* v. *Security Trust & Savings Bank*, 340 U.S. 47, 50 (1950) (relation back cannot "operate to destroy the realities of the situation").